Moore v. *H. R. Rd.*, 12 Id. 156; *Porter* v. *Buckfield Branch Rd.*, 32 Me. 539.

And in *Otter* v. *Breevoort Petroleum Co.*, 50 Barb. 247, it is held that an agreement by an incorporated company, to sell shares of its own stock for less than par, is valid on the face of it, binding the company to deliver the stock. But in this case, the court avoided the question of public policy, and as to the rights of creditors by saying that the facts were not before the court to raise this question.

ADELBERT HAMILTON.

Supreme Court of Illinois.

HOLTZMAN *v.* HOY.

In an action for damages for negligence and unskilfulness on the part of defendant, as a physician and surgeon, in the treatment of plaintiff's leg, the want of professional skill of the defendant is put in issue, and the burden of proof is on the plaintiff.

The proper and only mode of showing want of skill on the part of the defendant was by proving that he did not exercise it; it could be neither established nor disproved by showing his general professional reputation; hence the question asked of a witness as to what his reputation is, in the community and among the profession, as being an ordinarily skilful and learned physician, was properly disallowed.

ERROR to the Appellate Court, Second District, to review a judgment affirming a judgment of the Circuit Court of Livingston county against defendant, in an action to recover damages for negligent and unskilful treatment by a physician and surgeon.

The facts are stated in the opinion.

Stevenson & Ewing, for plaintiff in error.

Strawn & Patton, for defendant in error.

The opinion of the court was delivered by

MULKEY, J.—The present writ of error brings before us for review a judgment of the Appellate Court for the Second District, affirming judgment of the Circuit Court of Livingston county in favor of Joseph Hoy, the defendant in error, and against Samuel E. Holtzman, the plaintiff in error, for the sum of $2500.

The action in form was trespass on the case, and the cause of action was alleged negligence and unskilfulness on the part of the defendant, as a physician and surgeon, in the treatment of the plaintiff's leg for serious and complicated fracture.

The case is submitted here on the briefs and arguments filed in the appellate court, and, as it most usually happens when this course is pursued, they are, in the main, occupied with a discussion of controverted questions of fact, a matter with which we have no con-

cern. The case, so far as it is open to review here, is brought within a very narrow compass, and may be disposed of in a few words.

On the trial below, the court refused to permit Dr. Gaylord, one of the defendant's witnesses, to answer the following question: "I will ask you what his (Dr. Holtzman's) reputation is in the community and amongst the profession as being an ordinarily skilful and learned physician;" and the court's action in disallowing the question is assigned for error. Waiving the formal objections to this question, which are apparent, we have no doubt of the correctness of the ruling of the court upon it.

The duty which the defendant as a physician and surgeon owed the plaintiff was to bring to the case in hand that degree of knowledge, skill and care which a good physician and surgeon would bring to a similar case under like circumstances.

While this rule, on the one hand, does not exact the highest degree of skill and proficiency attainable in the profession, it does not, on the other hand, contemplate merely average merit. In other words, in order to determine who will come up to the legal standard indicated, we are not permitted to aggregate into a common class the quacks, the young men who have had no practice, the old ones who have dropped out of the practice, the good, and the very best, and then strike an average between them. This method would evidently place the standard too low.

As a physician or surgeon cannot bring the requisite bill to any case unless he has it, it follows the professional skill of the defendant was, if not in express terms, at least by implication, put in issue in this case; and the *onus probandi* was upon the plaintiff to show his want of such skill. The proper and only mode of doing this was by proving that he did not exercise it in the treatment of the plaintiff's leg. It does not, however, follow that because the defendant's skill, or rather the want of it, was put in issue, it could be either established or disproved by showing his general reputation. While his skill, or the want of it, was put in issue, his reputation in that respect was not put in issue, and therefore evidence to establish it was properly excluded. Suppose it appeared from the evidence that the treatment of the plaintiff's leg was proper and in every respect according to the most approved surgery, and evidence of the character offered had been admitted, would it have availed the plaintiff anything if it further appeared from the evidence that

the defendant was generally reputed to be an unskilful and unsafe surgeon? Surely not. The hypothesis here suggested, as we conceive, is but a presentation, from a different standpoint, of the principle contended for, but in a way that more forcibly illustrates its unsoundness. There are many reasons outside of those mentioned why evidence of this character is not admissible.

First, its bearing upon the issue is too remote and in many, if not in most cases, it would tend to mislead the jury rather than enlighten them. The veriest quack in the country, by his peculiar methods, not unfrequently becomes very famous, for the time being, in his own locality; so much so that every person in the neighborhood might safely testify to his good reputation. It is true that one's reputation thus acquired is generally of short duration. His patrons sooner or later must pay the penalty of their credulity by becoming the victims of his ignorance, and with that his good name vanishes. Yet, according to the principle contended for, the quack, in such case, when called to account for his professional ignorance, might successfully entrench himself behind his previous good reputation.

Again, one may in many respects be a good practitioner, and deservedly stand well in the neighborhood in which he lives, and yet, at the same time, be grossly ignorant about some matters in the line of his profession which would render him liable, if by reason thereof his patient should be improperly treated and thereby subjected to loss or injury. In such case, it is manifest, evidence of the defendant's good reputation would be no answer to an action brought for the injury sustained, and its admission would be clearly calculated to mislead the jury.

Other illustrations might be given of the impropriety of admitting such testimony, but it is not necessary to do so.

The general view here presented, we think, sufficiently meets the main points made by counsel for plaintiff in error upon the defendant's refused instructions, and for this reason we do not deem it necessary to discuss them in detail. Suffice it to say in general terms that, taking the instructions as a whole, we think the law, as applicable to the case made by the evidence, was fairly laid down to the jury, and that in this respect plaintiff in error has no ground to complain.

In this connection it may be added that the opinion in this case delivered by Mr. Justice BAKER in the appellate court (19 Brad. Ill. 459) discusses the questions made upon the instructions in a

very full and elaborate manner, and we are fully satisfied with the view taken of them in that opinion.

Judgment affirmed.

I. GROUNDS UPON WHICH THE PHYSICIAN'S LIABILITY IS BASED.—"Where one holds himself out to the public as having professional skill, and offers his services to those who accept them on that supposition, he is responsible for want of the skill he pretends to, even when his services are rendered gratuitously:" Cooley on Torts 650. But where there is no undertaking for skill, the want of it can create no liability: *Beardslee* v. *Richardson*, 11 Wend. 25; *Shields* v. *Blackburne*, 1 H. Bl. 158. "Where friends and acquaintances are accustomed to give, and do give, to each other voluntary services, without expectation of reward, either because other assistance cannot be procured, or because the means of parties needing help will not enable them to engage such as may be within reach, the law will not imply an undertaking for skill, even when the services are such as professional men alone are usually expected to render:" Cooley on Torts 650. Hence, under such circumstances, the one who undertakes to administer treatment in case of sickness, either voluntary or by request, is only liable for gross negligence. "But if by forcing himself into a case he excludes a competent physician, he is liable for *culpa levis*, or the lack of the diligence of a specialist:" Whart. on Neg., sect. 732, p. 622; *Hord* v. *Grimes*, 13 B. Mon. 188; *Ruddock* v. *Lowe*, 4 F. & F. 519.

Hence, it may be said generally that the liability of one rendering medical services is measured by the amount of skill he undertakes to show. "The foundation of the doctrine is that one who undertakes any office, employment, duty or trust, contracts to perform it with integrity, diligence and skill:" 20 Am. Law Rev. 80; 3 Bl. Com. 165; *Sumner* v. *Utley*, 7 Conn. 263. He must bring that amount of skill to the execution of his services, which he has undertaken to show, whether or not it is done gratuitously: Whart., sects. 493, 500; Smith on Neg. pp. 9, 126. But in England, prior to the stats. 21 & 22 Vict., ch. 90, sect. 31, as a physician could not maintain an action for his fees, except upon an express contract, he was held liable only for gross negligence; while a surgeon or apothecary, being entitled to recover compensation, were subject to the usual rule of accountability: 20 Am. Law Rev. 80, 81; Shear. & Redf. on Neg., p. 509, sect. 431. It is believed that this distinction never existed in America. The Supreme Court of Illinois expressly rejected it, in *McNevins* v. *Lowe*, 40 Ill. 209, where it is said: "If a person holds himself out as a physician he must be held to ordinary care and skill in every case of which he assumes charge, whether in the particular case he has received fees or not."

II. THE CONTRACT IMPLIED. The Supreme Court of New Hampshire, in *Leighton* v. *Sargent*, 27 N. H. 460, states the contract of the physician and surgeon as follows: "By our law a person who offers his services to the community generally, or any individual, for employment in any professional capacity as a person of skill, contracts with his employer: 1. That he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and by those conversant with that employment as necessary and sufficient to qualify him to engage in such business." 2. "That he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his

knowledge, to accomplish the purpose for which he is employed. He does not undertake for extraordinary care or extraordinary diligence any more than he does for uncommon skill." 3. "In stipulating to exert his skill and apply his diligence and care, the medical and other professional men contract to use their best judgment." "This is believed to be an accurate statement of the implied promise:" Cooley on Torts 649. The rule commonly applied to all cases where skilled labor is employed and required is the criterion by which the physician's liability is determined. He is not presumed to engage for extraordinary skill which belongs to a few men only, or extraordinary endowments or acquirements —reasonable skill constitutes the measure of the engagement in regard to the thing undertaken. "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that you will, at all events, gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons, who have higher educations and greater advantages than he has, but he undertakes to bring a reasonable, fair and competent degree of skill:" per TINDALL, C. J., in *Lauphier* v. *Phipos*, 8 C. & P. 475. "The general principles of law defining the civil responsibilities and duties of physicians, lawyers, engineers, machinists, shipbuilders, brokers and other classes of men whose employment requires them to transact business demanding special skill and knowledge are the same:" Elwell Med. Jur. (3d ed.) 19. The following adjudged cases fully support the doctrine as above given: *Long* v. *Morrison*, 14 Ind. 595; *Branner* v. *Stormont*, 9 Kan. 51; *Teft* v. *Wilcox*, 6 Id. 46; *Viley* v. *Burns*, 70 Ill. 162; *McNevins* v. *Lowe*, 40 Id. 209; *Barnes* v. *Means*, 82 Id. 379; *Grannis* v. *Branden*, 5 Day 260; *Landon* v. *Humphreys*, 9 Conn. 209; *Howard* v. *Grover*, 15 Shep. (Me.) 97; *Patten* v. *Wiggin*, 51 Me. 549; *Ballou* v. *Prescott*, 64 Id. 305; *Gallagher* v. *Thompson*, Wright (Ohio) 466; *Craig* v. *Chambers*, 17 Ohio St. 253; *Potter* v. *Warner*, 91 Penn. St. 362; *Merts* v. *Detweiler*, 8 W. & S. 376; *Boydston* v. *Giltner*, 3 Oregon 118; *Carpenter* v. *Blake*, 60 Barb. 488; *Wood* v. *Clapp*, 4 Sneed (Tenn.) 65; *Leighton* v. *Sargent*, 27 N. H. 460; *Hesse* v. *Knippel*, 1 Mich. (Nisi Prius) 109; *Hitchcock* v. *Burgett*, 38 Mich. 501; *Reynolds* v. *Graves*, 3 Wis. 416; *Graham* v. *Gautier*, 21 Tex. 111; *Holtzman* v. *Hoy*, 19 Brad. (Ill. App.) 459.

But it is to be observed that some cases seem to indicate a tendency towards establishing a stricter accountability with reference to medical practitioners, than the cases just cited.

In *Armond* v. *Migent*, 34 Ia. 300, it is said that the civil responsibility of physicians and surgeons, is not governed by the same rules as apply to mechanics and artisans. See, also, 1 Bouv. Inst. 403; see comments on this tendency in *Leighton* v. *Sargent*, 27 N. H. 468, and Elwell's Med. Jour. 19, 20; *Haucke* v. *Hooper*, 7 C. & P. 81. The measure of the "reasonable care and skill" required, is the average of that possessed by the profession as a body, and not of the "thoroughly educated:" 20 Am. L. Rev. 83: *Smothers* v. *Hanks*, 34 Ia. 286. See the dissenting opinion of BECK, J., in this case, where he declares that there can be no such thing as "average standard," that it is entirely imaginary, and he insists that the measure of skill and diligence required, is that which is ordinarily exercised by the "thoroughly educated;" citing *McCandless* v. *McWha*, 22 Penn. St. 261; *Long* v. *Morrison*, 14 Ind. 595; see also *Haire* v. *Reese*, 7 'Phila. (Pa.) 138, which supports the high standard rule. But the weight of authority, as stated above, is decidedly against this rule.

ADVANCED STATE OF PROFESSION AND LOCALITY, AS ELEMENTS IN DETERMINING LIABILITY.—The advanced state of the profession at the date of the treatment is a necessary element in determining whether or not the physician exercised that skill demanded: *Small* v. *Howard*, 128 Mass. 135; *Smothers* v. *Hanks*, 34 Ia. 286; *Tefft* v. *Wilcox*, 6 Kan. 46, 61; *McCandless* v. *McWha*, 22 Penn. St. 261; 20 Am. L. Rev. 84; as well as the particular locality in which the alleged negligence occurred: 20 Am. L. Rev. 84, 85, 86; *Gates* v. *Fleischer*, 30 N. W. Rep. (Wis.) 674, *post*. Hence city practitioners, where the opportunities for proficiency are vastly superior to those of small towns or rural or sparsely populated districts, are held to a much higher degree of learning than practitioners in the latter localities: Id.; *Tefft* v. *Wilcox*, 6 Kan. 63, 64. A physician who possesses skill and neglects to use it, is liable for all damages resulting from such neglect: *Long* v. *Morrison*, 14 Ind. 595. By his contract he undertakes that he will use reasonable care and diligence, dependent upon the importance and delicacy or difficulty of the treatment: *Leighton* v. *Sargent*, 27 N. H. 471, 472; 20 Am. L. Rev. 86.

IV. AS TO THE EXERCISE OF JUDGMENT.—While a physician is not responsible for errors of judgment, or mere mistakes in matters of reasonable doubt and uncertainty (*Patten* v. *Wiggin*, 51 Me. 594; *Williams* v. *Poppleton*, 3 Ore. 139; *Tefft* v. *Wilcox*, 6 Kan. 46), yet the law requires that he exercise his best judgment. If the error of judgment is so gross as to be inconsistent with the use of the degree of skill, implied by his contract, and demanded by the law, the physician will be held responsible: *West* v. *Martin*, 31 Mo. 375; see opinion of BELL, J., in *Leighton* v. *Sargent*, 27 N. H. 460, as to judgment to be exercised; also Elwell on Med. Jur. 29; 20 Am. L. Rev. 86, 87, 88.

"A physician who conducts himself with propriety ought to be protected, when he acts to the best of his skill and knowledge. Every one is liable to commit error. The uncertainty of the medical science is almost proverbial. Different schools entertain different and almost irreconcilable theories as to the nature, mode and treatment of disease. Every case presents its own peculiar symptoms and characteristics. Slight circumstances, easily overlooked, and sometimes difficult of detection, render cases radically different. A remedy that would prove effective in the one would probably prove fatal in the other. Often many doubts and uncertainties surround the medical practitioner. He is unavoidably exposed to mistake and error. And the law recognising his position, only requires that he use that skill and diligence in the exercise of his profession, as is fairly and reasonably consistent with the standard of his science. A contrary rule would be unreasonable, and a higher demand than most physicians could comply with. It would almost require the exercise of perfect wisdom in fallible human beings:" 20 Am. L. Rev. 87, 88.

Where errors of judgment result from want of ordinary care and skill, the responsibility attaches, however careful the judgment is exercised: *Leighton* v. *Sargent*, 27 N. H. 472; *Montriou* v. *Jeffreys*, 2 C. & P. 113; *Hart* v. *Frame*, 3 Jar. 547; Elwell on Med. Jur. 31.

And in exercising his best judgment, as consistent with reason, the physician is only required to anticipate the natural and probable consequences of his treatment. Thus, he cannot be held responsible for the disastrous effect, resulting from administering chloroform as an anæsthetic, to a patient of a peculiar temperament, where such peculiarity is unknown to the physician: *Bogle* v. *Winslow*, 5 Phila. (Pa.) 136; *Com.* v. *Thompson*, 6 Mass. 134. The latter case is practically overruled in *Com.* v. *Pierce*, 24 Am. L. Reg. 117; s. c. 6 Crim. L.

Mag. 190; *Ballou* v. *Prescott*, 64 Me. 305.

V. EVIDENCE AS TO MODE OF TREATMENT.—Where the mode of treatment in a given case conforms to the settled doctrines of the particular school to which the physician belongs, he is relieved from all responsibility, as the law favors no school and no system of medicine is prohibited. Hence, evidence of the practice of physicians of other schools is inadmissible: *Bowman* v. *Woods*, 1 G. Greene (Ia.) 441; *Patten* v. *Wiggin*, 51 Me. 597; *Williams* v. *Poppleton*, 3 Ore. 139; *Corsi* v. *Maretzak*, 4 E. D. Smith (N. Y. C. P.) 1.

Where the case will admit of but one mode of treatment, a different remedy would be evidence tending to show want of skill: *Patten* v. *Wiggin*, 51 Me. 597.

The statement in the principal case, that the want of professional skill of the physician is put in issue, naturally follows, from the rules hereinbefore stated. If such was not the rule of law, it would be idle to insist that the practitioner should be possessed of "reasonable skill:" see *Morrill* v. *Tegarden*, 19 Neb. 535; s. c. 26 N. W. Rep. 202; as to proper allegations in the petition, see also *Whittaker* v. *Collins*, 25 N. W. Rep. 632. But whether the rule is correct, as stated in the principal case, that the proper and only mode of showing want of such skill, is by proving that he did not exercise it in the particular case, admits of some doubts, yet, it is believed to be in accordance with the authorities, notwithstanding contrary intimations in a few cases. In *Mayo* v. *Wright*, 29 N. W. Rep. 832; s. c. 5 West. Rep. 595, the action was for malpractice in treating a fractured limb. The declaration did not allege general incompetency of the physician, and the court held that no recovery could be had on this ground, but only on the ground that the physician did not properly exercise the skill which he in fact possessed. An inference may follow from this, that if general incompetency had been alleged in the petition it could be proved, and if proved a recovery had on that ground.

The treatment of each individual case is the criterion in ascertaining the physician's liability: 20 Am. L. Rev. 89. The Illinois Court of Appeals fully discussed this question when the principal case was before it, *Holtzman* v. *Hoy*, 19 Brad. 459, 461, *et seq.* The court said: "The issue before the jury was in respect to the propriety of the treatment in the particular case under investigation, and if want of ordinary skill or negligence in that case were shown, it would have been no answer to say the physician and surgeon had a good reputation for skill and learning." In *Mertz* v. *Detweiler*, 8 W. & S. 376, the Supreme Court of Pennsylvania say, "It may be said that his general qualifications might serve to shed light on the propriety of his practice in this particular instance; but it is a light which would be less likely to lead to a sound conclusion than to lead astray. The jury, assisted by the opinions of medical witnesses, would be better able to judge of the treatment from the treatment itself, than from the more remote consideration of the defendant's professional reputation, which was consequently not the evidence of which the case was susceptible." In *West* v. *Martin*, 31 Mo. 378, it is said: "Whether errors of judgment will or will not make a surgeon liable in a given case, depends not merely on the fact, that he may be ordinarily skilled as such, but whether he has treated the case skilfully, or has exercised in its treatment, such reasonable skill and diligence as is ordinarily exercised in his profession."

Williams v. *Poppleton*, 3 Ore. 139, expressly rules that a physician should not be allowed to prove what is his reputation for skill in his profession; nor is the opinion of another physician to be taken as to whether or not defendant is a skilled surgeon, but the witness may state

facts within his knowledge as to the defendant's skill.

The general opinion of the practitioner with whom the physician studied his profession, or of the professions of the school at which he graduated, are inadmissible. So evidence that he was proficient and skilled two years previous to the treatment of the given case, is likewise inadmissible: *Leighton* v. *Sargent*, 27 N. H. 460.

In the recent case of *Gates* v. *Fleischer*, 30 N. W. Rep. 674, the malpractice consisted in negligent treatment of a woman afflicted with uterine trouble. The plaintiff recovered judgment in the trial court, which, upon appeal, was affirmed. The evidence tended to prove that the treatment was with caustics, that the plaintiff had no ulcers upon her womb, or in the cervical canal; hence such treatment was unjustifiable, for advanced medical science discards the use of caustics in cases of ulceration, as a dangerous practice; that even if caustic treatment had been proper, it was applied in an improper manner by the physician; that such treatment proved harmful, in that it caused *cicatrix* in, and the closure of, the cervical canal, producing severe and protracted pain and prostration, and, as a consequence, greatly injuring plaintiff's health. The evidence also showed that plaintiff had not been guilty of any negligence or want of reasonable care of herself, or failure to observe the proper directions of the physician, which contributed proximately to the injury. The trial judge instructed the jury that "the defendant being a physician and surgeon, and, as such, called to prescribe for, and professionally treat, the plaintiff, he was bound to bring to her aid and relief such skill as is ordinarily possessed and used by physicians and surgeons in the vicinity or locality in which he resides, having regard to the advanced state of the profession at the time of the treatment;" which the Supreme Court held to be a correct statement of the rule.

The limb upon which the alleged malpractice occurred, can not be exhibited to the jury after lapse of several years: *Carstens* v. *Hanselman*, 28 N. W. Rep. 159; s. c. 27 Id. 18. Whether in any case it can be done, *query?* Id.

The mere fact that the physician refuses consultation with other men of his science, is no assumption upon his part that he is possessed of more than ordinary skill, and his declination in this regard does not vary the application of any of the rules above stated: *Potter* v. *Warner*, 91 Penn. St. 362; *State* v. *Baker*, 2 Wils. 359; *Patten* v. *Wiggins*, 51 Me. 594.

VI. Effect of Contributory Negligence.—Consistent with reason and law, the contributory negligence of the patient in causing the damage will preclude a recovery: Thomp. on Neg. 1215, sect. 63, and cases; *Smith* v. *Smith*, 2 Pick. (Mass.) 621; *Chamberlain* v. *Porter*, 9 Minn. 260; *Geiselman* v. *Scott*, 25 Ohio St. 86. The general principles of the doctrine of contributory negligence are applicable: Shearm. & Redf. on Neg. sects. 34 and 37, and note. Negligence of the nurse concurring with that of the physician is imputable to the patient: *Potter* v. *Warner*, 91 Penn. St. 362; but if the acts of negligence can be so separated as to show that the injury proceeded solely from the fault of the physician; *i. e.*, if the latter's negligence was the proximate cause of the injury, and that of the nurse only being remotely connected therewith, an action will lie against the physician: *Hibbard* v. *Thompson*, 109 Mass. 289. See *Gates* v. *Fleischer*, 30 N. W. Rep. 674, where an instruction to the effect that if the ill health of the patient was caused, in whole or in part, by *septicæmia* or blood poison (the patient not being treated for this trouble), and the weakness and debility since, is the result, in whole or in part, of the effects of blood poisoning, no recovery can be had, was held properly rejected. If this were the law, "a person

suffering from one disease could never recover damages for malpractice of a physician who treats him for another disease, no matter how gross and inexcusable such malpractice, or how grievous the injury caused thereby:" Id.

"It is the duty of the patient to cooperate with his professional adviser, and conform to the necessary prescriptions, if they are such as an ordinarily proficient physician would dictate. But if he does not do so, either wilfully or because of pain, the physician is not responsible: *McCandless* v. *McWha*, 22 Penn. St. 262; *Haire* v. *Reese*, 7 Phila. (Pa.) 138. But if the physician's improper treatment is much aggravated by improper care of those in charge, this does not relieve the physician of the consequences of his own acts, yet this fact will operate to reduce the damages. This for the reason that the cause of action becomes perfect before the mismanagement of the nurse supervenes: *Wilmot* v. *Howard*, 39 Vt. 447. So, a physician is responsible for his wrongful acts and unskilfulness, although the case is given over to another, who might have discovered the error by care and skill: *Hathorn* v. *Richmond*, 48 Vt. 559. Here, as in all cases of contributory negligence, the capacity of the party injured to judge of the probable results is an important element. Hence, if the patient be insane, he is not chargeable with contributory negligence: *People* v. *N. Y. Hospital*, 3 Abb. (N. C.) 229. And it should be observed, that where the patient relies on his own judgment, and not upon that of the surgeon, as to the propriety of an operation, the surgeon is not liable for injurious consequences arising therefrom: *Hancke* v. *Hooper*, 7 C. & P. 81; *Gramm* v. *Boener*, 56 Ind. 497. *Volenti non fit injuria.*" 20 Am. L. Rev. 91, 92.

EUGENE MCQUILLIN.

St. Louis, Mo.

Supreme Court of Rhode Island.

AMERICAN SOLID LEATHER BUTTON COMPANY *v.* ANTHONY, COWELL & CO., ET ALS.

Numbers arbitrarily chosen may be taken as trade marks and will be protected as such.

But numbers already in use and known to the trade in connection with given styles of goods cannot be appropriated to his exclusive use by a maker of such styles of goods.

BILL IN EQUITY for an injunction and an account.

W. W. & S. T. Douglas, for complainant.

Warren R. Pearce, for respondents.

The opinion of the court was delivered by

STINESS, J.—The complainant is a manufacturer of buttons and nails, with solid leather heads. In order to distinguish the different styles which it manufactures, it has assigned certain numerals, arbitrarily chosen, *e. g.* 30, 40, 60, 70, 111, etc., to designate each